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NO.

Supreme Court, U.S.

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In The
Supreme Court of the United States
OCTOBER TERM, 1987

ROBERT "BIG BIRD" SMITH
Respondent

V

WALTER REED, THE WASHINGTON
PARISH DISTRICT ATTORNEY
Petitioner

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 22, 1987.

QUESTIONS PRESENTED FOR REVIEW

1. Can the *Monell*, infra, "policy or custom" theory of governmental liability under 42 U.S.C. 1983 be extended to pierce the *Malley*, infra, shield of prosecutorial absolute immunity?

2. Can a United States Court of Appeal, for purposes of imposing governmental liability under 42 U.S.C. 1983, restructure the Constitution of the State of Louisiana to cast a District Attorney into the role of local, rather than state, government and thereby ignore the decision of the Supreme Court of Louisiana to the contrary.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is not reported and appears as Appendix A hereto. That Opinion summarily affirmed the judgment by the district court against District Attorney Walter P. Reed. The opinion of the district court, not reported, appears in Appendix B hereto.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 22, 1987.

Petitioners made no application for rehearing and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254 (1) and *Mitchell v. Forsyth*, 472 U.S. 511, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985)

STATUTES INVOLVED

1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.



STATEMENT OF THE CASE

On or about January 20, 1986, plaintiff, respondent herein, Robert "Big Bird" Smith, was arrested with other individuals for possession of cocaine. The District Attorney, petitioner herein, made a decision to refuse to charge respondent with that crime and made his decision known to respondent on or about August 26, 1986.

The fact is that the District Attorney refused to charge him with the commission of a crime for which he had been arrested. This case does not involve the dismissal after charges had been brought. Again, respectfully, it is emphasized that the facts in this case revolve about a *refusal to charge* and are distinctly different from a dismissal of charges where plaintiff is alleging they were initially wrongfully brought by a district attorney.

On January 26, 1987, the original complaint was filed as an action seeking judgment for damages, attorney's fees and punitive damages for defendants' conduct alleged to have been in violation of 42 U.S.C. 1983, 1988 and the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution. Plaintiff invoked the pendant jurisdiction of the court pleading "the Louisiana Law of Negligence and Torts, pursuant to LA Civil Code Articles 2315, 2316, 2317, and 2324."

The allegations in the complaint against petitioner, District Attorney Walter P. Reed are set out in Paragraph I.e., XIII, XIV, XVIII, XIX and XXII.

Paragraph XIII contains the substance of the complaint against petitioner and reads as follows:

"Complainant avers that defendant City of Bogalusa Police Department, and Walter Reed, the District Attorney for the Parish of Washington, failed to perform a timely and proper investigation of this matter, and when information was revealed which would exculpate complainant, *charges were still held and maintained*

against complainant, without just, legal and/or probable cause, constituting malicious prosecution.

(emphasis added)

The complaint goes on to plead, in paragraph XIX, that the District Attorney was unaware of the offensive acts alleged to be customs of the defendant municipalities. The allegations of causation in fact are set out in paragraph XX, as follows:

As a direct and proximate result of the aforesaid acts, omissions, systematic deficiencies, *policies and customs of defendant municipalities* agents, officers, and deputies did falsely and illegally arrest and detain complainant.

(emphasis added)

On April 10, 1987 petitioner filed a motion to dismiss for failure to state a claim, for prosecutorial immunity and for sanctions. The motion was heard on May 20, 1987 and was denied on May 27, 1987 by order entered on May 29, 1987. The Court of Appeal affirmed on December 22, 1987.

REASONS FOR ALLOWING THE WRIT

Summary

The District Court relied upon and the Court of Appeals sanctioned, the recent decision of the United States Court of Appeals for the Fifth Circuit, *Mairena v. Foti*, 816 F2d 1061 (5th Cir. 1987). That decision extended the *Monell*, *infra*, "policy or custom" theory of governmental liability under 42 U.S.C. 1983 into a state prosecutor's office. This extension of liability has resulted in a judicial course straying so far from the beaten path established by this Honorable Court, *Imbler and Malley*, *infra*, as to call for an exercise of this Court's power of supervision.

Additionally, the United States Court of Appeal for the Fifth Circuit has ignored the Constitution of the State of Louisiana. That Circuit Court has restructured Louisiana government to cast a state constitutional officer into a role of local government in the face of a decision of The Supreme Court of Louisiana to the Contrary. *Diaz*, *infra*. Such action is beyond the power of the federal judicial system and calls for an exercise of this Court's power of supervision.

The pleadings recite that the plaintiff was charged with a criminal offense on January 20, 1986 and that these charges were dismissed (sic) on August 26, 1986. The pleader concludes that this eight (8) month period of time was too long; and, because the District Attorney took that long to make a decision not to prosecute, the plaintiff's civil rights were somehow violated.

To permit the maintenance of this civil rights action against a state prosecutor is tantamount to the issuance of an injunction. The District Attorney will be effectively enjoined from even considering charges in marginal cases. The plaintiff could not have obtained an injunction to prevent the District Attorney from considering the charges made against him during that eight (8) month period. The plaintiff cannot now maintain a civil rights action to indirectly avoid those principles which would have clearly denied him relief had the action been brought during the eight (8) month period.

The complaint fails to state a claim on which relief can be granted because it does not allege any conduct on the part of the District Attorney in violation of Title 42 U.S.C. 1983.

The District Attorney as a State Prosecuting Attorney acting within the scope of his duties in initiating and pursuing a criminal prosecution, or declining to do so, is absolutely immune from a civil suit for damages based upon violation of 42 U.S.C. 1983.

Argument Amplifying The Reasons:

Imbler v. Pachtman, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct.984 (1976) considered the effect upon a state prosecutor

"...by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." Following that consideration, this Court said:

We conclude that the considerations outlined above dictate the same absolute immunity under 1983 that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. With the issue thus framed, we find ourselves in agreement with Judge Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecution:

"As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire v. Biddle* 177 F2d, 579, 581 2dCir. 1949, cert. denied, 339 U.S. 949, 94 L.Ed. 1363, 70 S.Ct. 803 (1950).

This Court then held, *Imbler*, *supra* @ p. 995:

We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from *a civil suit* for damages under 1983. . . (emphasis added)

More recently, in *Malley v. Briggs*, 475 U.S. 335, 89 L. Ed. 2d 271 (1986), 106 S.Ct. 1092 (1986), this Court reemphasized and further explained its decision in *Imbler*, *supra*:

... Furthermore, petitioner's analogy, while it has some force, does not take account of the fact that the prosecutor's act in seeking an indictment is but the first step in the process of seeking a conviction. Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see latter decisions in terms of their effect on his potential liability. Thus, we shield the prosecutor seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process. *Malley* at 1097.

A reading of the complaint clearly shows that Robert "Big Bird" Smith is asking a federal court to impose liability upon the District Attorney for the initial phase of his prosecutorial work. The above quoted language is a clear mandate from this Court that the role of the federal court is to "*shield the prosecutor*".

The District Court relied upon the recent decision *Mairena v. Foti*, 816 F.2d 1061, (5th Cir 1987). The District Court's reliance on that case, and sanctioned by the Court of Appeal, is misplaced and results in a judicial course straying far from the beaten path established by this Court. *Imbler and Malley*, *supra*.

The District Judge apparently decided to permit the case to proceed as one against the "office" of the District Attorney while recognizing that "personally" the District Attorney is immune from liability. This distinction between "personal" liability and "office" liability challenges the considerations which dictated this Court's decision in *Imbler*, supra. The concern of this Court was "...the proper functioning of the criminal justice system..." *Imbler*, supra @ p. 993-994. The granting of immunity to the prosecutor is ancillary thereto so that he will not be prevented from the vigorous and fearless performance of an essential duty.

But, it is the functioning of the criminal justice system which was the gravamen of the decision in *Imbler*, supra, and which suggests that the following inquiries must be made to reach a conclusion compatible with the considerations dictated by this Court.

Query No. 1: Will the criminal justice system function as envisioned by this Court if the funds essential to its proper functioning are diverted to satisfy a judgment for damages from a civil suit under § 1983?

Query No. 2: Will it prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system if the funds available to the District Attorney for that purpose are diverted to satisfy a judgment for damages from a civil suit under § 1983?

It is obvious that the functioning of the criminal justice system will be impaired if the District Attorney's funding is subjected to the payment of damages in satisfaction of a judgment rendered in a civil suit under § 1983. The mandate of this Court is that the central actor in the judicial process not be impaired. *Malley*, supra.

The complaint names District Attorney Walter Reed as a defendant in his official capacity.

In *Mairena*, supra, the *Monell* requirements were again considered by the Fifth Circuit:

In *Monell v. Department of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), the Supreme Court, holding for the first time that local governments may be sued for compensatory damages, *id.* at 690, 98 S.Ct. at 2035, made clear that local government liability under section 1983 is established only where the "execution of a government's policy or custom, whether made by its law makers or by those whose edicts or acts may be fairly said to represent official policy, inflicts the injury." *Id.* at 694, 98 S.Ct. at 2036.

Extending the *Monell*, supra, holding to the office of the District Attorney is in conflict with this Court's decision in *Imbler and Malley*, supra; more particularly, the conflict is with the considerations announced by this Court which dictated their decision in those cases, i.e. the preservation of the integrity of the judicial process of the criminal justice system. Thus, the Court of Appeals for the Fifth Circuit has used *Monell*, supra, to pierce the shield given the prosecutor by *Malley*, supra.

Throughout these proceedings counsel for Robert "Big Bird" Smith has urged that pendant jurisdiction be exercised to decide the issue of malicious prosecution as a matter of Louisiana law. He cites *Foster v. Powdrill*, 463 So.2d 981 (La.App. 2d.Cir. 1985) for authority to claim a state cause of action; however, that case recognizes the law as unsettled in Louisiana, and that the Louisiana Supreme Court has not ruled on that issue.

This Honorable Court long ago decided that a federal district court should not forecast state law. In *Railroad Commission of*

Texas v. Pullman Co., 312 U.S. 496, 85 L.Ed.2d 971, 61 S.Ct. 643 (1941), @ p. 645 the Court said:

But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the Supreme Court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. *Glenn v. Field Packing Co.*, 290 U.S. 177, 54 S.Ct. 138, 78 L.Ed. 252; *Lee v. Bickell*, 292 U.S. 415, 54 S.Ct. 727, 78 L.Ed. 1337. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.

Notwithstanding the mandate by this Court that a prosecuting attorney be shielded, *Malley*, supra p. 1097, the Court has also mandated the federal courts to refrain from unnecessary rulings which could later be supplanted by a controlling decision of a state court.

The State Supreme Court spoke directly on the characterization of the Office of District Attorney in *Diaz v. Allstate Insurance Co.*, 433 So.2d 699 (LA 1983). The Court held that "a district attorney is a constitutional officer who serves in the judicial branch and exercises a portion of the sovereign power of the state within the district of his office. [Citations omitted.]

His office, duties, and powers are governed by the constitution and the legislature, and are not subject to local control. La. Const. Art VI §§ 5(G) and 7(B). His office, therefore, is an office of state, not local government . . ." 433 So2d at 701. Thus, the Eleventh Amendment of the Constitution of the United States would prohibit the kind of relief sought in the complaint against the District Attorney.

If the funds of the District Attorney are diverted from his use in the performance of his duty toward the criminal justice system to the satisfaction of § 1983 federal court judgments, he will be effectively enjoined from the performance of those duties. Such federal interference with state criminal prosecutions has been previously prohibited by this Court. In *Younger v. Harris*, 401 U.S. 37, 27 L.Ed 2d 669, 91 S.Ct. 746 (1971) the Court said:

In all of these cases the Court stressed the importance of showing irreparable injury, the traditional prerequisite to obtaining an injunction. In addition, however, the Court also made clear that in view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is "both great and immediate." *id* at 751.

Certainly there are no allegations of both great and immediate harm found in the pleadings before the Court.

In *Younger*, *supra*, the federal interference was direct. The § 1983 litigation is an indirect interference with the same effect. Clearly, this Court cannot permit the federal interference indirectly when it would not do so directly.

Conclusion

For the foregoing reasons, a Writ of Certiorari should issue to the Court of Appeals for the Fifth Circuit.

RESPECTFULLY SUBMITTED,

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APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 87-3468
Summary Calendar

**ROBERT "BIG BIRD" SMITH,
Plaintiff-Appellee**

versus

**OFFICER MIKE EDWARDS, ET AL.,
Defendants,**

**WALTER REED,
The Washington Parish District Attorney,
Defendant-Appellant**

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-0368-J)

(December 22, 1987)

Before POLITZ, JOHNSON, and HIGGINBOTHAM, Circuit
Judges.

JOHNSON, Circuit Judge:*

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Walter Reed, a Louisiana parish district attorney, appeals the district court's refusal to dismiss a civil rights suit against him. Because we agree with the district court that absolute immunity does not bar suits against district attorneys in their official capacity, we affirm.

I. BACKGROUND

In January 1986, Robert "Big Bird" Smith was arrested and charged with possession of cocaine. Smith stated that at the time of the arrest, he had stopped at a residence on an errand and had been arrested along with the occupants of the dwelling. Charges against Smith were dropped on August 26, 1986.

Smith, who was a professional football player at the time of the arrest, filed this suit against the City of Bogalusa, its police department, officer Mike Edwards, and Walter Reed, the Washington Parish District Attorney. The section of the complaint naming Reed described him as:

e) *Walter Reed, the Washington Parish District Attorney*: a duly incorporated and authorized law enforcement agent and agency vested with prosecutorial power organized, authorized and existing under the laws of the State of Louisiana, domiciled in Washington Parish, State of Louisiana.

Record at 2.

Among other allegations, Smith maintained that the City of Bogalusa Police Department and District Attorney Reed had failed to perform a timely investigation and had maintained charges against him without good cause when they knew of information that would exculpate him. He alleged that the actions giving rise to his injury resulted from the "policies, customs, and usages of the State of Louisiana, and/or the Parish of Washington, and/or the City of Bogalusa". Record at 7. Smith alleged substantial injury, including pain and mental suffering, and further alleged that defendants' actions had caused him to lose employment with the National Football League. Smith sought \$6 million in compensatory and punitive damages.

District Attorney Reed filed a motion to dismiss based on prosecutorial immunity. The district court denied the motion to dismiss, and Reed filed a timely notice of appeal.

II. DISCUSSION

On appeal, Reed contends that the district court erred in not dismissing him from the suit based on absolute prosecutorial immunity. Although denial of a motion to dismiss is not ordinarily considered a final appealable order for purposes of 28 U.S.C. § 1291, the Supreme Court has held that a denial of a claim of absolute immunity is an order appealable before final judgment. **Mitchell v. Forsyth**, 472 U.S. 511, 525, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985).

In **Imbler v. Pachtman**, the Supreme Court held that a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal suit was absolutely immune from suit under 42 U.S.C. § 1983. 424 U.S. 409, 427, 96 S. Ct. 984, 993, 47 L. Ed. 2d 128 (1976). Absolute immunity, however, can only be raised as a defense to suit by an official who is sued in his personal capacity. **Kentucky v. Graham**, 473 U.S. 159,

166-67, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985); **Owen v. City of Independence, Missouri**, 445 U.S. 622, 638 n.18, 100 S. Ct. 1398, 1409 n.18, 63 L. Ed. 2d 673 (1980); **Mairena v. Foti**, 816 F.2d 1061, 1064 n.1 (5th. Cir. 1987). Personal capacity suits seek to impose personal liability upon an official for actions he takes under color of state law. **Graham**, 473 U.S. at 165, 105 S. Ct. at 3105. Official capacity suits, on the other hand, actually seek to impose liability on the government entity of which the officer is an agent. **Graham**, 473 U.S. at 165-66, 105 S. Ct. at 3105-06. Thus, in an official capacity suit, the real party in interest is the governmental entity, and the suit arises from the fact that the entity's policy or custom played a part in the violation of federal law. **Graham**, 473 U.S. at 166, 105 S. Ct. at 3105.

Smith's complaint is not altogether clear in indicating the capacity in which District Attorney Reed is being sued. However, Reed acknowledges in his brief that Smith sued Reed in his official capacity. Appellant's brief at 10. The wording of the complaint also supports an official capacity suit, with its references to Reed as an "authorized law enforcement agent *and agency*" and to the "policies and customs" of the defendant government entities. Record at 2 and 8 (emphasis added). The district court reached the same conclusion.

Reed also argues that suit against him is barred by the eleventh amendment, because, under state law, district attorneys are agents of the state. Because this argument was not presented to the district court in any of the papers supporting Reed's motion to dismiss, we cannot discuss it here. Reed is free to pursue that argument in the district court, although we note that it is apparently foreclosed by **Mairena**. 816 F.2d at 1064 n.1.

III. CONCLUSION

A district attorney sued in his official capacity cannot appeal to absolute prosecutorial immunity. District Attorney Reed concedes that Smith sued Reed in his official capacity. Therefore, the district court did not err in denying Reed's motion to dismiss.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANAROBERT "BIG BIRD" SMITH
VERSUS
WALTER REED, ET ALCIVIL ACTION
NO. 87-368
SECTION "J"

ORDER AND REASONS

The Motion of District Attorney, Walter Reed, to Dismiss came up for hearing on Wednesday, May 20, 1987. After reviewing the motion, the memoranda of the parties, the record and the law applicable to this case the Court hereby renders its Order and Reasons.

On January 26, 1987, Robert Smith, filed suit against Officer Mike Edwards; Unknown Agents and Officers of the Bogalusa Police Department; The Bogalusa Police Department; the City of Bogalusa; Walter Reed, the Washington Parish District Attorney and their insurers. The suit is brought pursuant to 42 U.S.C. §§ 1983, 1988, and the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution with pendent state claims.

District Attorney Reed argues that the complaint against him should be dismissed due to presecutorial immunity in § 1983 cases. In *Mairena v. Foti*, Slip Op. 86-3238, n.1 (5th. Cir., May 18, 1987) the Fifth Circuit held that "prosecutorial immunity is a personal defense and is not applicable in a § 1983 suit against the district attorney in his official capacity. See, *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); *Owen v. City of Independence, Mo.*, 445 U.S. 622, 638, n.18, 100 S.Ct. 1398, 1409 n.18, 63 L.Ed.2d. 673 (1980).

In the present case the allegations were brought against the district attorney in his official capacity.

Accordingly, IT IS ORDERED that the district attorney's Motion to Dismiss is DENIED.

New Orleans, Louisiana, this the 27th day of May, 1987.

/s/ Patrick E. Carr

UNITED STATES DISTRICT JUDGE

